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An unending variety of topics

Wednesday, December 07, 2005

Another proposed amendment

Here's my own tentative proposal (besides my variations on Buchanan's proposals). It may be even more important and interesting than Buchanan's (as important as those are); why is left as an exercise for the reader. I call it the Jurisdictional Choice Amendment.

"No law shall infringe an arbitration clause in a contract, nor shall original jurisdiction of said arbitrator over any area of civil law of the United States or any unit of government therein specified in said clause be denied. The courts of the United States and of any unit of government therein shall defer to the findings of fact of said arbitrator unless clearly erroneous."

Posted by Nick Szabo at 2:29 PM

5 comments:

Serveto said...

Here are a few I would do:

1) Give state legislatures the power to redistrict federal government seats within their own states.

2) Give state legislatures the power to raise and lower their federal representatives pay.

10:41 PM

Anonymous said...

"...shall defer to the findings of fact of said arbitrator unless clearly erroneous."

Doesn't that leave open a massive loophole?

11:25 AM

Pages

- Home

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

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Nick Szabo said...

"Clearly erroneous" is the standard test for overturning a trial court's findings of fact. The result is that appeals courts would have to treat chosen arbitrators in the same way they treat trial courts, at least in the very important and broad area of fact finding. There are a bunch of less important areas I have left unspecified in the interests of brevity which have to be looked at to see if they leave open loopholes for appeals courts to more freely overturn arbitrators. Using more broad language, something like "appeals courts shall review findings of facts and law of said arbitrators using the same standards as for trial courts" might be better language, but we'd then have to look hard to see if there are any legitimate reasons the two should be treated differently in particular areas, because this leaves quite a bit less flexibility for the appeals courts to do so.

Mike's ideas are interesting, I'll have to think about them.

4:57 PM

Nick Szabo said...

Here's another proposed jurisdiction reform amendment for civil cases. It really needs work, but the basic idea is to take pseudo-contract and pseudo-restitutionary arguments for jurisdiction over a person (often made by the Supreme Court and commentators) seriously by insisting on real contracts and application of real restitionary (implied-in-law) contractual principles.

According to the pseudo-restitutionary argument, a government is entitled to jurisdiction over a defendant because the defendant has "availed" himself to the "benefits of the forum" (roads, crime protection, etc.) by having "minimal contacts" with the forum (e.g. visiting there or selling stuff there).

A more just approach along these lines is a true restitiutionary or implied-in-law contract approach: a defendant should not have more of his liberty (via injunction) or property in a civil case put at risk in a forum than the benefits the defendant has received the from government asserting jurisdiction. In other words the restitutionary argument should not be a mere excuse, but should be treated much more like contract law actually treats implied-in-law contracts (a.k.a. restitution) cases. I also include commission of an intentional tort within a territory as implying consent to that territory's jurisdiction.

Another goal of the amendment is to deprecate territory, which is much less important in an age of jet travel and the Internet. Territory can no longer by itself justify jurisdiction. The amendment thus deterritorializes jurisdiction where appropriate, and replaces it with jurisdictional choice (express contract) and restitutionary (implied contract) jurisdictions.

Specifically, the provisions reinforces jurisdictional choice and for default jurisdiction (where there is no prior jurisdictional clause agreed to by the parties) (a) replaces "tag" and "minimal contacts" territorial jurisdiction over civil law with restititutionary (implied contract) jurisdiction, (b) gives only the state where a contract or civil relationship (e.g. marriage) was entered into jurisdiction for the life of that contract or relationship, and (c) retains default territorial jurisdiction over local intentional torts and property.

Here is my very rough draft:

Courts of the United States and any governmental entity therein ("forums") shall have personal jurisdiction in a civil case over a defendant only where the parties have agreed by contract to said jurisdiction, or where there is no binding choice of jurisdiction clause in a contract between the parties and
(1) the defendant has obtained benefits from the forum that outweigh the liberty and property of the defendant put at risk in this dispute,
(2) the defendant has while present within the territory of the forum committed an intentional tort,
(3) where the dispute involves a contract or civil relationship, and the contract or relationship was entered into within the territory of the forum, or
(4) where the dispute involves existing rights or security interests in property located within the forum and the remedy is limited to that property.

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ► 2006 (130)
- ▼ 2005 (44)
  - ▼ December (16)
    - Robotic structures
    - Patents: the problem of gratuitous elements
    - LabCorp v. Metabolite briefs
    - The security and productivity of farms
    - A tamper evidence protocol from China
    - Secure property titles and development
    - The Justice Department vs. the United States Cons...
    - New Zealander challenges Amazon one-click patent
    - New book -- The Origins of Value
    - Copyright v. the blogosphere?
    - RIM asks Supreme Court to hear BlackBerry case
    - U.S. patent reform dead for this year
    - Another proposed amendment
    - What three constitutional amendments would you lik...

A wide variety of "gotchas" need to be explored, for example what happens when there are multiple parties to a dispute with conflicting jurisdictional choices. (There is case law precedent for most of these scenarios stemming from already existing jurisdictional choice statutes -- some Christmas vaction research for me :-)

1:04 PM

Serveto said...

I say we go the way of Australia: a citizen 1 of state A can be sued by a citizen 2 in state B regardless of whether citizen 1 availed himself of state B.

I think it's about time we shed this 19th century conception.

6:38 PM

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